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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE COMMISSIONER OF TRANSPORTATION OF THE STATE OF NEW YORK,
Petitioner,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 1

CONCLUSION 5

TABLE OF AUTHORITIES

CASES: Page

Houston, E. & W. T. Ry. v. United States, 234 U.S. 342 (1914) 3

Kentucky Utilities Co. v. I.C.C., 721 F.2d 537 (6th Cir. 1983) 1, 2

North Carolina v. United States, 325 U.S. 507 (1945) . 1, 2, 3

State of Texas v. United States, 730 F.2d 339, cert. denied, No. 83-2102 (Oct. 9, 1984) 2, 3

Utah Power & Light Co. v. I.C.C., 747 F.2d 721 (D.C. Cir. 1984) 1

Wheeling-Pittsburgh Steel Corp. v. I.C.C., 723 F.2d 346 (3rd Cir. 1983) 2

STATUTES:

49 U.S.C. § 11501(b)-(d) 1-2

49 U.S.C. § 11501(b)(6) 2

49 U.S.C. § 11501(c) 2

49 U.S.C. § 11501(e) 3

49 U.S.C. § 11501(e)(1)(B) 3

49 U.S.C. § 11501(e)(2)(A) 3

49 U.S.C. § 11501(e)(2)(A)(i) 4

49 U.S.C. § 11501(e)(2)(B) 3

MISCELLANEOUS:

H.R. Conf. Rep. No. 97-780, 97th Cong., 2d Sess. (1982). 3

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REPLY BRIEF OF PETITIONER

This Court's opinion in *North Carolina* v. *U.S.*, 325 U.S. 507 (1945), requires ICC decisions preempting state regulation of intrastate rates to meet a high degree of certainty. In an effort to avoid this standard respondents rely upon recent cases holding *North Carolina* standards to be inapplicable in the case of decisions preempting state regulation of intrastate *rail* rates under Section 214 of the Staggers Act.[1] 49 U.S.C.

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[1] *Utah Power & Light Co.* v. *ICC*, 747 F.2d 721, 736 (D.C. Cir. 1984) and *Kentucky Utilities Co.* v. *ICC*, 721 F.2d 537, 542-543 (6th Cir. 1983). However, the Third Circuit has held that the

§ 11501(b)-(d). (Brief of Resp., 8-9). That reliance is misplaced.

The preemption authority conferred by the Staggers Act is decidedly broader than that conferred by the Bus Act. Indeed, as a practical matter, Section 214 of the Staggers Act eliminates independent state regulation of the intrastate rates of interstate rail carriers. Thus, it preempts *all* state jurisdiction over rail general rate increases, inflation-based rate increases, and fuel adjustment surcharges. 49 U.S.C. § 11501(b)(6). If a state wishes to continue regulating other types of rail intrastate rate adjustments it must do so exclusively in accord with federal law,[2] (*State of Texas* v. *U.S., supra,* page 347), and the ICC is empowered to review state rate decisions for compliance with federal law. *Kentucky Utilities Co.* v. *ICC, supra.* Where the state decision does not conform to federal law, the ICC "shall determine and authorize the [rail] carrier to establish the appropriate rate." 49 U.S.C. § 11501(c).

In contrast, the ICC's role under the Bus Act is very limited. Fundamentally, the states are to con-

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Staggers Act does not change the *North Carolina* standards. *Wheeling-Pittsburgh Steel Corp.* v. *ICC,* 723 F.2d 346, 353 (3rd Cir. 1983). Although the 5th Circuit has not specifically addressed the question, its decision in *State of Texas* v. *U.S.,* 730 F.2d 339 (1984) aligns its views with those of the D.C. and 6th Circuits.

[2] Respondents attempt to create the impression that in Section 17 of the Bus Act Congress imposed federal bus rate regulatory standards on the states. Brief of Resp. 10, fn. 10. This is not so. Congress did no more than *urge* the states to establish among themselves uniform bus rate regulatory standards which are "consistent" with standards established by the ICC. H.R. Conf. Rep., 53. However, the states cannot yet do so because the ICC has established no such standards.

tinue to regulate intrastate bus rates under state law and state regulatory standards.[3] The ICC can preempt state authority only if a state denies a bus rate increase or fails to act on one in 120 days *and* the ICC finds that the bus rate in effect "causes unreasonable discrimination against or imposes an unreasonable burden on interstate or foreign commerce." (49 U.S.C. § 11501(e)(1)(B)). This is the same finding this Court required in its 1914 decision in the *Shreveport* Case[4] and the Congress requires it in the Bus Act in precisely the same statutory language as was before this Court in the *North Carolina* Case. See *State of Texas* v. *U.S., supra,* at pages 345-346.

Respondents' erroneous view of the breadth of the federal preemption of state authority worked by Section 17 of the Bus Act leads them to the wrong construction of the Act's rebuttable presumptions. 49 U.S.C. § 11501(e)(2)(A) and (B). According to respondents, the Bus Act ". . . reflects Congress' clear intent that intrastate service not be regulated differently from interstate service." Brief of Resp., 10. From this false premise, respondents conclude that the ICC can require intrastate rates to be raised to the level of interstate rates unless the state can demonstrate differences in operating conditions, services, or costs between interstate and intrastate service. Brief of Resp., 4, 5, 9, 11, 12.

Respondents' construction flies in the face of the language of Section 11501(e) and its legislative his-

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[3] H.R. Conf. Rep. 97-780, 97th Cong., 2d Sess. (1982), 52 (hereafter called H.R. Conf. Rep.).

[4] *Houston, E. & W. T. Ry.* v. *U.S.*, 234 U.S. 342 (1914).

tory. States are free to contest federal preemption on the grounds "... that the State action was reasonable". H.R. Conf. Rep. 52. The fact that intrastate bus rates are lower than interstate rates merely creates a rebuttable presumption that the lower state rate imposes an unreasonable burden on interstate commerce. 49 U.S.C. § 11501(e)(2)(A)(i). If the right of state to contest federal preemption is to have any meaning at all, it is entitled to rebut that presumption by demonstrating that its action was reasonable, i.e., that its lower intrastate rate does *not* impose an unreasonable burden on interstate commerce. To say otherwise is to convert a rebuttable presumption into an irrebuttable presumption, in flat disregard of the intent of Congress.

Finally, respondents have failed conspicuously to address petitioner's question dealing with the requirement in bus rate preemption cases for an ICC finding respecting the minimum level of intrastate rates necessary to remove any unreasonable discrimination against or burden on interstate commerce. Their silence on this question reflects their erroneous view that the Bus Act contemplates equal intrastate and interstate bus rates—a result never intended by Congress.

CONCLUSION

Wherefore, Petitioner requests that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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